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OPINION  
No. 2000-O-07

DATE ISSUED: June 26, 2000

ISSUED TO: Tim Priebe, Dickinson City Attorney and legal counsel  
for Stark Development Corporation

CITIZEN'S REQUEST FOR OPINION

On April 20, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Volesky of The Dickinson Press asking whether the Stark Development Corporation, Inc. violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session which was not authorized by law and by taking final action during the executive session.

FACTS PRESENTED

The board of directors (Board) for Stark Development Corporation, Inc. (SDC) held a meeting on April 17, 2000. During this meeting, the Board received and apparently accepted a written legal opinion of its attorney that the SDC was a "public entity" and was therefore required to comply with the state open records and meetings laws. See N.D.C.C. §§ 44-04-17.1(12), 44-04-18, 44-04-19. This opinion was based on the contractual relationship between the SDC and the City of Dickinson under which the SDC receives and expends the proceeds of a tax levied by the City under N.D.C.C. § 40-57.4-04. The opinion also noted some exceptions to the open records and meetings laws in the area of economic development which might apply to SDC.

Later during the same meeting, the Board held an executive session to discuss certain economic development records and information which it claims are exempt from the open records and open meetings laws under N.D.C.C. § 44-04-18.4. Following the executive session, the Board voted on a number of items, referring only to the number of each item on the agenda of the executive session.

The executive session was recorded pursuant to N.D.C.C. § 44-04-19.2. This office has reviewed the recording, as well as the minutes of the executive session and the documents discussed during the executive session.

1. Whether the executive session of the Board on April 17, 2000, was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.
2. Whether the Board violated N.D.C.C. § 44-04-19.2 by taking final action during the executive session.

#### ANALYSES

##### Issue One:

A nongovernmental organization, even if formed as a private non profit corporation, may nevertheless be a "public entity" if it is supported by public funds or expends public funds. N.D.C.C. § 44-04-17.1(12)(c). The SDC has accepted its attorney's conclusion that it is a "public entity" because it is supported by the sales tax proceeds it receives from the City of Dickinson. See also 1996 N.D. Op. Att'y Gen. 99 (Sept. 13 to Gerald Sveen) (an organization is expending public funds if the funds are appropriated directly to the organization by a public entity). As a result, all of the Board's records and meetings regarding public business must be open to the public unless a statute specifically provides otherwise. N.D.C.C. §§ 44-04-18, 44-04-19.

The SDC relies on subsection 5 of N.D.C.C. § 44-04-18.4 as the legal authority for its executive session on April 17. This subsection provides:

Unless made confidential under subsection 1, the following economic development records and information are exempt:

- a. Records and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, or expand within this state. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.
- b. Trade secrets and commercial or financial information received from a person, business, or industry that is interested in or is applying for or receiving <PAGE NAME="p.O-29">financing or technical assistance, or other forms of business assistance.

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This provision was previously codified as N.D.C.C. § 44-04-18.2 (repealed, 1997 N.D. Sess. Laws ch. 381, § 23). See also N.D.C.C. § 44-04-19.2(1) (a meeting may be closed to consider or discuss closed or confidential records).

This office has not previously analyzed in detail the meaning of N.D.C.C. § 44-04-18.4(5), but we have observed that the similar open records exception in former N.D.C.C. § 44-04-18.2 was not as broad as the exceptions under N.D.C.C. ch. 6-08.1 and § 6-09-35 for information pertaining to customers of the Bank of North Dakota. 1995 N.D. Op. Att'y Gen. L-253 (Nov. 8 to Bryan Dvirnak).

N.D.C.C. § 44-04-18.4(5) provides a "safe haven" from the open records law for certain categories of economic development records and information. The first provision in this subsection authorizes a public entity to withhold from the public the identity, nature, and prospective location of a business or industry which is interested in locating, relocating, or expanding within the state when there has been no previous public disclosure of that interest. N.D.C.C. § 44-04-18.4(5)(a). The term "prospective" means "likely to happen" or "expected," and does not include a business which has already disclosed to the public its decision whether to locate, relocate, or expand within the state. The American Heritage Dictionary 995 (2d coll. ed. 1991). Therefore, subdivision (a) of N.D.C.C. § 44-04-18.4(5) applies only until such time that the industry or business discloses to the public its decision to locate, relocate, or expand within the state, or its decision not to do so.

Upon request for an economic development record which includes material which is exempt under subdivision (a) of N.D.C.C. § 44-04-18.4(5), a public entity may remove the information which would identify, or reasonably lead to the identification of, the business or industry but must release the remaining information (unless protected under another exception to the open records law). N.D.C.C. § 44-04-18.10 (duty to excise closed material and disclose the remaining information). C.f. Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 402 (D.C. Cir. 1980) (commercial or financial information which is "stripped of its identifying features . . . takes on the character of statistics" and must be released).

The second subdivision in N.D.C.C. § 44-04-18.4(5) is both broader and narrower than the first provision. Subdivision (b) is a broader provision in the sense that it continues to apply even after the person, business, or industry receives financing or other economic development assistance. Subdivision (b) is narrower in the sense that it applies only to "[t]rade secrets and commercial or financial <PAGE NAME="p.0-30">information received from a person, business, or industry . . . ." (Emphasis added). Although the terms "commercial" and "financial" are broadly defined to mean information pertaining to commerce or finances, 1998 N.D. Op. Att'y Gen. L-17 (Mar. 2 to Carol

Olson), these terms would not include the identity of the person, business, or industry. Subdivision (b) also would not apply to records and information which are generated by the public entity itself rather than "received from" the person, business, or industry.<sup>1</sup> C.f. *Buffalo Evening News, Inc. v. Small Business Admin.*, 666 F.Supp. 467, 469 (W.D.N.Y. 1987) (exception under Freedom of Information Act for trade secret, commercial, and financial information "obtained from a person" does not apply to loan information generated by the Small Business Administration in the course of its involvement with its borrowers).

Having identified the categories of records and information which are subject to N.D.C.C. § 44-04-18.4, I will turn to the discussion during the Board's executive session on April 17.

The recording and minutes indicate that the Board's discussion during the executive session was driven by the documents presented by the SDC staff. The session started with approval of the minutes of the last executive session,<sup>2</sup> approval of the SDC's Accounts Payable report without any discussion by the Board, and consideration of the Director's report.<sup>3</sup> The discussion of the Director's report during the executive session pertained to references in the report on the SDC's efforts to recruit specific businesses for prospective location or expansion in the area. Information regarding these businesses is exempt under N.D.C.C. § 44-04-18.4(5)(a).

In contrast to the businesses listed in the Director's report, the businesses which are included in the Accounts Payable report are recipients of PACE (partnership in assisting community expansion) loans which have already located, relocated, or expanded in the area and can no longer be described as "prospective." Therefore, the identity of those businesses is not exempt under N.D.C.C. <PAGE NAME="p.O-31">§ 44-04-18.4(5)(a). Although the amounts listed in the Accounts Payable report may be financial information regarding each business, those amounts are not "received from" the businesses as required under subdivision (b) of N.D.C.C. § 44-04-18.4(5). Rather,

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<sup>1</sup> However, if information which is exempt under N.D.C.C. § 44-04-18.4(5)(b) has been included in a document generated by a public entity, those portions of the document which disclose the exempt information are also exempt under that statute. C.f. *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (information contained in government report was supplied by a person and could be withheld).

<sup>2</sup> Minutes of an executive session can be closed to the public. 1998 N.D. Op. Att'y Gen. O-132 (Nov. 24 to Douglas Schauer).

<sup>3</sup> I note that portions of the Director's report which were not discussed during the executive session do not involve information which is exempt under N.D.C.C. § 44-04-18.4 and would be open to the public under N.D.C.C. § 44-04-18.

the amounts are based on information generated by the SDC itself or obtained from sources other than the business. Thus, the information in the Accounts Payable report is not exempt under N.D.C.C. § 44-04-18.4(5).

Furthermore, although PACE recipients are "customers" of the Bank of North Dakota for purposes of the confidentiality provisions in N.D.C.C. ch. 6-08.1 and § 6-09-35, those exceptions apply specifically to the Bank and do not extend to the SDC, which is a separate public entity and possesses the records in its own capacity rather than as an agent of the Bank. See 2000 N.D. Op. Att'y Gen. 51, 54 (Feb. 28 to Frank Wald) (the confidential nature of a record is generally lost when shared with another public entity unless an exception to the open records law applies to the records in the possession of the receiving entity). Accordingly, because the amounts listed in the Accounts Payable report are not confidential or otherwise exempt from the open records law, any discussion of those amounts would have to occur in an open meeting.

The discussion during the remainder of the meeting involved two businesses which are being recruited for location or expansion in the area, and three businesses which have pending applications for funding under the PACE program. See generally N.D.C.C. ch. 6-09.14.4. Because the location, relocation, or expansion of these businesses is "prospective," the "identity, nature, and location" of these businesses are exempt under N.D.C.C. § 44-04-18.4(5)(a).

Overall, with the exception of a few passing remarks which were of no significance, the executive session on April 17 was limited to discussions of information regarding specific businesses which may locate, relocate, or expand in the area served by the SDC. Because this information is exempt under N.D.C.C. § 44-04-18.4(5), it is my opinion that the executive session was authorized by law.

#### Issue Two:

The final item listed on the Board's agenda was adjournment of the regular meeting to hold an executive session. The agenda does not indicate that the regular meeting would resume after the conclusion of the executive session. Because final action on items discussed during <PAGE NAME="p.O-32">an executive session generally must occur during an open meeting, N.D.C.C. § 44-04-19.2, but the agenda failed to indicate that the open meeting would resume after the executive

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<sup>4</sup> To be eligible for a loan under the PACE program, an applicant must propose to use the loan for a new or expanding business. N.D.C.C. § 6-09-04. Thus, the identity of an applicant for a PACE loan can be closed to the public under N.D.C.C. § 44-04-18.4(5) until the loan is accepted by the applicant.

session, the opinion request asks whether the Board improperly took final action during the executive session.

In its response to this office, the SDC indicates that the Board reconvened in open session after the conclusion of the executive session. The minutes provided by the SDC indicate that the Board president noted prior to the executive session that the agenda was inaccurate. The president stated that the Board meeting would not be adjourned until after the executive session was completed and final action could be taken during the open portion of the meeting. With one exception discussed in the next paragraph, the recording and minutes of the executive session show that the Board refrained from taking any action during the executive session and waited until the open portion of the meeting was resumed to vote on the items it considered during the executive session.

As discussed earlier in this opinion, the Accounts Payable report is not exempt under N.D.C.C. § 44-04-18.4(5) and is an open record. Even though the Board members did not discuss the content of the report during the executive session, their approval of the report was a final action that should have occurred in the open portion of the meeting. N.D.C.C. § 44-04-19.2(2)(e). Therefore, it is my opinion that the Board violated N.D.C.C. § 44-04-19.2 by voting to approve the report in the executive session.

#### CONCLUSIONS

1. The executive session of the Board on April 17, 2000, was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.
2. The Board violated N.D.C.C. § 44-04-19.2 by taking final action to approve the Accounts Payable report during the executive session.

#### STEPS NEEDED TO REMEDY VIOLATION

The Board must make the Accounts Payable report available to the public upon request as an open record and must re-approve the report during an open meeting.

Failure to disclose the report and issue a notice of a meeting to approve the report within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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